

IN THE COURT OF APPEALS OF IOWA

No. 0-136 / 09-1449
Filed April 21, 2010

ROBERT J. WILLIAMS,
Petitioner-Appellant,

vs.

**KW PRODUCTS, INC. and
HARTFORD INSURANCE,**
Respondents-Appellees.

Appeal from the Iowa District Court for Linn County, Thomas Koehler,
Judge.

Petitioner appeals the district court decision affirming the ruling of the
workers' compensation commissioner denying his request for penalty benefits.

REVERSED AND REMANDED.

Thomas M. Wertz and Daniel J. Anderson of Wertz & Drake, Cedar
Rapids, for appellant.

Greg A. Egbers and Jean Z. Dickson of Betty, Neuman & McMahon,
P.L.C., Davenport, for appellees.

Heard by Vogel, P.J., Eisenhauer, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

I. Background Facts & Proceedings

Robert Williams was employed as a machinist for KV Products, Inc. In 2002 Williams was treated for left rotator cuff tendonitis. In 2004 Dr. James Pape determined Williams had a six percent left upper extremity impairment, which translated into a four percent whole person impairment. Williams was not given any work restrictions, and he did not miss any time from work as a result of his shoulder problem.

Williams developed pain in the forearms of both arms. He first sought medical treatment for this condition on September 9, 2005, and was diagnosed with bilateral tendonitis of the forearms. Dr. Melissa Young Szalay gave Williams work restrictions in December 2005, and in January 2006 recommended that he find another line of work. Williams was treated with occupational therapy and steroid injections. On June 9, 2006, Dr. Young Szalay's office notes indicate a zero impairment rating, but she anticipated final work restrictions.

Williams had a functional capacity evaluation on June 27 to 28, 2006. The report found:

[M]oderate elbow strength restrictions, moderate strength restrictions with bilateral supination, mild to moderate strength restrictions with bilateral wrist extension, decreased bilateral grip strength, possible presence of left forearm swelling (as evidenced by increased left forearm girth measurements post-activity Day Two) and subsequent decreased tolerances to handling/grasping, repetitive forearm rotation, and fine manipulation activities.

The report determined Williams could work at a light-medium category at below waist level and the light work category above waist level. On July 10, 2006, Dr.

Young Szalay determined Williams had reached maximum medical improvement as of June 9, 2006, and reported, “[f]inal impairment is 0% for both upper extremities but he does have final work restrictions.” She noted his final work restrictions were outlined in the functional capacity evaluation.

Williams filed a claim for workers’ compensation benefits on July 16, 2007. He was laid off from his job with KV Products on December 12, 2007. He completed a course of study in “computer animated drafting,” and obtained employment in that field.

On April 22, 2008, Williams had an independent medical evaluation with Dr. Ray Miller. Dr. Miller diagnosed bilateral radial tunnel syndrome, more symptomatic on the left. He rated Williams’s impairment as five percent on the right arm and twenty percent on the left. Dr. Miller recommended radial tunnel releases, and also gave work restrictions.

Williams sent a request for admissions to the employer and its insurance carrier (“the respondents”). Their response, served on May 28, 2008, admitted “[t]hat Robert Williams has sustained permanent physical impairment from his 9/9/05 work injury.” On June 3, 2008, respondents served a supplemental response stating that they denied Williams sustained permanent physical impairment because Dr. Young Szalay had indicated he did not suffer any permanent impairment.

After an administrative hearing, a deputy workers’ compensation commissioner rejected Dr. Young Szalay’s impairment rating of zero. The deputy found Williams had a twenty percent impairment rating of the left arm, and five

percent of the right arm, and concluded Williams had a fifteen percent impairment to the body as a whole. The deputy rejected Williams's request for penalty benefits:

Here, the main treating physician rated impairment at zero and no physician concluded that Williams had any impairment at all until Dr. Miller issued his report on April 22, 2008, less than three months before the hearing. Liability for permanency in this case was fairly debatable and no penalties are in order.

Williams appealed to the commissioner only on the issue of penalty benefits. The commissioner affirmed the deputy, stating:

Claimant asserts it is an inconsistent medical opinion, requiring further investigation by defendant, that an injured worker has no permanent physical impairment or loss of use of a scheduled member of the body, but must permanently restrict the use of that member. However, when the issue is the extent of loss of functionality, an argument that the restriction is prophylactic to prevent injury, rather than evidence of loss of function, is fairly debatable and sufficient grounds to deny permanent disability benefits without risk of a penalty, at least until this agency issues a final decision to the contrary.

Williams filed a petition for judicial review. The district court found "there is substantial evidence to support the conclusion that there was no unreasonable delay or denial of benefits to Petitioner." The court affirmed the commissioner's decision denying penalty benefits. Williams appeals.

II. Standard of Review

Our review of decisions of the workers' compensation commissioner is governed by Iowa Code chapter 17A. Iowa Code § 86.26 (2007). We review the commissioner's decision for the correction of errors at law, not de novo. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 330 (Iowa 2005). We review the district court's decision by applying the standards of section 17A.19 to

the commissioner's decision to determine if our conclusions are the same as those reached by the district court. *Univ. of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

We reverse the factual findings of the commissioner only if those findings are not supported by substantial evidence. *Midwest Ambulance Serv. v. Ruud*, 754 N.W.2d 860, 864 (Iowa 2008). Evidence is substantial if a reasonable mind would accept it as adequate to reach the same conclusion. *Asmus v. Waterloo Comty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). The ultimate question is not whether the evidence might support a different finding, but whether it supports the findings actually made. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 420 (Iowa 2001).

On issues of law, "the interpretation of workers' compensation statutes and related case law has not been clearly vested by a provision of law in the discretion of the agency." *Lakeside Casino v. Blue*, 743 N.W.2d 169, 173 (Iowa 2007) (citation omitted). For this reason, we do not defer to the commissioner's interpretation of the law. *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 334 (Iowa 2008). If the commissioner's interpretation is erroneous, we substitute our interpretation for that of the commissioner. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).

Where an issue is raised regarding the application of the law to the facts, we reverse only if the commissioner's application was "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(I); *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004). We give some deference to the commissioner's

determination, but less deference than we give to the commissioner's findings of fact. *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

III. Penalty Benefits

The statutory authority for penalty benefits is found in Iowa Code section 86.13, which provides:

If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

In order to receive penalty benefits, a claimant must first establish a delay in the payment of benefits. *Schadendorf*, 757 N.W.2d at 334. The employer then has the burden to prove a reasonable cause or excuse for the delay. *Id.* at 334-35.

An employer has a reasonable cause or excuse if (1) the delay was necessary for the insurer to investigate the claim; or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. *City of Madrid v. Blasnitz*, 742 N.W.2d 77, 81 (Iowa 2007). If a claim is "fairly debatable" the employer has a reasonable basis to contest the claim. *Id.* at 82. "A claim is 'fairly debatable' when it is open to dispute on any logical basis." *Id.* (citation omitted). However, a denial of benefits may be supportable when the denial is made, but may later become unreasonable in light of subsequent information. *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 683 (Iowa 1995), *overruled on other grounds by Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 48 (Iowa 2004).

A. We first note that on May 29, 2008, the respondents served responses to Williams's request for admissions and admitted that Williams sustained permanent physical impairment from his work injury. Iowa Rule of Civil Procedure 1.511 provides, "[a]ny matter admitted under rule 1.510 is conclusively established in the pending action unless the court on motion permits withdrawal or amendment of the admission." A court has discretion to permit the withdrawal of an admission. *Double D Land & Cattle Co., Inc. v. Brown*, 541 N.W.2d 547, 550 (Iowa Ct. App. 1995).

On June 3, 2008, respondents served "Defendant's Supplemental Response to Claimant's Request for Admissions," which stated respondents denied the request for admission that Williams sustained permanent physical impairment. Respondents did not file a motion with the agency, however, seeking to withdraw or amend their previous admission, and therefore did not obtain an agency ruling permitting the withdrawal or amendment of the admission. The deputy addressed this issue and found "the existence of permanent physical impairment is conclusively established."

We conclude that at least as of May 29, 2008, there was no longer an issue as to whether Williams sustained permanent physical impairment as a result of his work-related injury. At that time there was no longer any reasonable or probable cause or excuse for a delay in the commencement of benefits. We conclude the commissioner erred in not awarding penalty benefits as a result of the delay occurring after May 29, 2008. We remand to the district court for an

order remanding the matter to the commissioner for a determination of the amount of penalty benefits.

B. We next turn to the issue of whether the respondents' delay in paying benefits prior to the admission on May 29, 2008, was reasonable. Williams contends the impairment rating of zero percent by Dr. Young Szalay is inconsistent with the doctor's other findings, and claims respondents had a duty to further investigate whether he sustained permanent partial impairment as a result of his work-related injury.

Penalty benefits in a workers' compensation case may be based on an employer's failure to engage in a reasonable investigation of an employee's claims. See *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 333 (Iowa 2002). An employer's failure to investigate further may give rise to an inference that the employer knew it had no reasonable basis for denying the claim. *Id.*

A treatise states:

An employer or carrier must be conceded a reasonable time in which to investigate and make a decision, but if it is dilatory about investigating, or perhaps makes no investigation at all, a penalty may be in order, although the rule is otherwise if the employer's delay in investigating was caused by a delay attributable to the claimant or the claimant's agents.

8 Arthur Larson & Alex K. Larson, *Larson's Workers' Compensation Law* § 135.03, at 135-12 (2009).

Respondents assert that they reasonably relied on Dr. Young Szalay's medical report on July 10, 2006, giving Williams a final impairment rating of zero percent. We believe Williams is correct in arguing that where, as here, the treating physician gives apparently inconsistent indications as to whether a

claimant has sustained a substantial loss of bodily function as a result of a work related injury, the employer/insurer has a duty to investigate further if it is to avoid being subject to potential penalty benefits.

Dr. Young Szalay's July 10, 2006 report did give Williams a zero percent impairment rating. That report, however, also imposed substantial work restrictions. Dr. Young Szalay noted that Williams had "lifting and carrying restrictions, push-pull restrictions, and most importantly he has restrictions of forearm rotation activities on a rare basis," and that such restrictions "apply to both upper extremities." She had earlier on April 28, 2006 told Williams she did not think he would be able to return to his usual job without flaring his symptoms.

The commissioner addressed this apparent inconsistency in Dr. Young Szalay's opinions, and found the restrictions were only prophylactic, and were not evidence of loss of function. The commissioner's finding appears to be unsupported by substantial evidence, however, because there was no evidence in the record affirmatively indicating that the restrictions were only prophylactic. More importantly, however, the commissioner's finding was legally incorrect. There is "no significant distinction between a lifting restriction based on a workers' physical inability to lift greater weight and a restriction imposed to prevent the reoccurrence of an existing injury." *Excel Corp. v. Smithart*, 654 N.W.2d 891, 901 (Iowa 2002). In each case the impact on the worker is the same. *Id.* Thus, regardless of whether the restrictions were prophylactic, Williams was given work restrictions and this is inconsistent with the finding that he had a zero percent impairment rating.

The respondents raise a further argument that the restrictions were based on Williams's previous injury in 2002, which resulted in a four percent impairment rating. Williams's 2002 work-related injury was to his left shoulder. He was not given any work restrictions as a result of this injury, and continued with the same job. Several years later he developed pain in both forearms. Dr. Young Szalay imposed the work restrictions we have quoted above. These restrictions applied to both arms. We do not believe there is any substantial evidence to support a finding that the current work restrictions are the result of the 2002 left shoulder injury.

We have determined the commissioner's determination that the opinion of the treating physician, Dr. Young Szalay, was not inconsistent was based on an incorrect legal conclusion. If the commissioner's interpretation of law is erroneous, we substitute our interpretation for that of the commissioner. *Meyer*, 710 N.W.2d at 219. We determine that under *Excel Corp.*, 654 N.W.2d at 901, no distinction is made for prophylactic work restrictions given for an employee's work-related physical condition. Based on our interpretation of the law, we determine Dr. Young Szalay's opinion that Williams should have work restrictions is inconsistent with her opinion that he had a zero percent impairment rating. Because her opinions were inconsistent, the respondents should have investigated further before denying benefits to Williams. We therefore also remand to the district court for an order remanding to the commissioner for application of the correct rule of law and a determination of what additional

amount, if any, of penalty benefits should be awarded for any delay occurring after July 10, 2006.

We conclude the district court erred in affirming the commissioner's denial of penalty benefits. We reverse the decision of the district court and remand to that court for an order remanding the matter to the commissioner for reconsideration of the issue of penalty benefits in light of this decision.

REVERSED AND REMANDED.